Goh Kheng Seong v Public Prosecutor

HIGH COURT (PENANG) — CRIMINAL APPEAL NO 41-126-91
VINCENT NG JC
8 JULY 1992

Criminal Procedure *— Sentence — Dangerous driving — Plea of guilty — Imposition of custodial sentence — Factors to be considered before imposing custodial sentence — Statement of facts — Duty of prosecutor to properly frame facts — Road Traffic Ordinance 1958 s 34A(1)*

Road Traffic *— Dangerous driving — Plea of guilty — Factors to be considered before imposing custodial sentence — Road Traffic Ordinance 1958 s 34A(1)*

Words and Phrases *— 'Shall on conviction be liable' — Road Traffic Ordinance 1958 s 34A(1)*

The appellant pleaded guilty to an offence of dangerous driving under s 34A(1) of the Road Traffic Ordinance 1958 ('the Ordinance'). The facts adduced by the prosecution only said that the appellant drove his motor lorry in such a manner that he knocked into the back of the deceased's bicycle. The decreased died soon after from the injuries suffered as a result of the accident. Before the appellant was sentenced, the prosecution asked the court to impose a 'balanced' sentence. The appellant was sentenced to six month's imprisonment and disqualified from driving all classes of vehicles for 12 months. He appealed.

Held, allowing the appeal:

(1) Cases of dangerous driving can be divided into two categories; first, those in which the accident had arisen through momentary inattention or misjudgment; and secondly, those in which the accused had driven in a manner which had shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. An accused who had been convicted because of momentary inattention or misjudgment and who had a good driving record should normally be fined and disqualified from holding a driving licence for the minimum statutory period.

(2) In the interests of the motoring public and other users, the courts should come down hard on certain motorists charged for dangerous driving, and where the facts warrants, impose custodial sentences. Before handing down a custodial sentence however, the court must be satisfied on the facts that the accused had shown beyond question, in the manner of his driving, a high degree of culpability amounting to a wilful and callous disregard for the safety of other road users or a selfish disregard for the safety of other road users or of his passengers as accords with the second definition of dangerous driving.

(3) The magistrate had caused a miscarriage of justice when he imposed the term of six months' imprisonment without any factual

basis for imposing such custodial sentence. The appellant was given an exemplary sentence more as a hope that it will be a deterrent to other motorists than because he had driven wilfully in a manner dangerous to the public. This is entirely contrary to the principle of sentencing.

(4) A clear line must be drawn between pre and post-conviction stages of a trial. Due to the wide statutory discretion given to the courts as regards the severity of sentence to be meted out to an accused, the charge itself does not form the basis for the sentence. Such basis must necessarily be from the facts of the offence put forward by the prosecution as admitted or contested by the accused as it is from such facts as admitted by the court that factors which aggravate the offence are gleaned for the purpose of ordering a punitive or custodial sentence.

(5) The words 'shall on conviction be liable to a term of imprisonment or to a fine ... or to both' in s 34A of the Ordinance does not overrule the exercise of the sentencer's discretionary powers.

[Bahasa Malaysia summary

Pemohon telah mengaku bersalah keatas suatu kesalahan memandu dengan membahayakan di bawah s 34A(1) Ordinan Lalu Lintas Jalan 1958 ('Ordinan itu'). Fakta yang dikemukakan oleh pihak pendakwa hanya menyatakan bahawa pemohon memandu motolorinya dengan sebegitu cara sehingga melanggar belakang basikal si mati. Si mati meninggal tidak lama kemudian kerana kecederaan yang dialaminya akibat kemalangan itu. Sebelum pemohon dihukum, pihak pendakwa telah meminta supaya mahkamah mengenakan hukuman yang setimpal. Pemohon telah dihukum enam bulan penjara dan dihilangkan kelayakan daripada memandu kenderaan dari mana-mana kelas selama 12 bulan. Pemohon telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Kes-kes memandu dengan menbahayakan boleh dibahagikan kepada dua kategori; pertama, dimana kemalangan itu berlaku kerana pemandu tidak memberi perhatian penuh atau salah agak untuk seketika; dan keduanya, di mana si tertuduh telah memandu sebegitu cara yang menunjukkan sikap mementingkan diri sendiri dan tidak mengendahkan keselamatan pengguna jalanraya yang lain atau tentang penunggang, atau dengan sikap tidak peduli. Seseorang si tertuduh yang telah disabitkan kerana tidak memberi perhatian penuh atau salah agak untuk seketika dan yang mempunyai rekod memandu yang baik patut biasanya didenda dan dihilangkan kelayakan daripada memegang lesen memandu untuk tempoh minimum statutori.

(2) Dalam kepentingan pemandu-pemandu awam dan lain-lain pengguna jalanraya, mahkamah sepatutnya mengenakan hukuman yang berat keatas pemandu yang tertentu yang telah dituduh memandu dengan membahayakan dan dimana sesuai, mengena-

kan hukuman tahanan. Tetapi, sebelum mengenakan hukuman tahanan, mahkamah mesti berpuashati atas fakta-fakta bahawa si tertuduh telah menunjukkan tanpa diragui lagi, dengan cara beliau memandu, suatu darjat kebersalahan yang tinggi yang disengajakan dan tidak berperasaan dan tidak mengendahkan keselamatan pengguna jalanraya yang lain atau menunjukkan sikap mementingkan diri sendiri dan tidak mengendahkan keselamatan pengguna jalanraya yang lain atau tentang penunggangnya iaitu tafsiran kedua memandu dengan membahayakan.

(3) Majistret telah menyebabkan salah laksana keadilan apabila beliau menjatuhkan hukuman enam bulan penjara tanpa sebarang asas faktual untuk menjatuhkan hukuman tahanan itu. Pemohon telah diberi suatu hukuman teladan dengan harapan agar hukuman itu akan menjadi suatu pencegahan kepada pemandu yang lain lebih daripada kerana beliau sengaja memandu dengan cara yang merbahaya kepada orang awam. Ini bertentangan sepenuhnya dengan prinsip kehukuman.

(4) Batas yang jelas mesti ditentukan di antara peringkat sebelum dan selepas sabitan di dalam suatu perbicaraan. Disebabkan oleh budi bicara statutori yang meluas yang diberi kepada mahkamah mengenai hukuman yang keras yang dikenakan kepada seseorang si tertuduh, tuduhan itu tidak membentukkan asas untuk hukuman itu. Asas ini mesti didapati dari fakta kesalahan yang dibentangkan oleh pihak pendakwa sepertimana yang diperakui atau dipertikaikan oleh si tertuduh itu. Oleh kerana dari fakta inilah sepertimana yang diterima oleh mahkamah yang faktor yang menerukkan lagi tuduhan dikutip untuk tujuan mengarahkan suatu hukuman punitif atau hukuman tahanan.

(5) Perkataaan 'shall on conviction be liable to a term of imprisonment ... or to a fine ... or to both' di dalam s 34A Ordinan itu tidak mengatasi penggunaan kuasa budi bicara penghukum.]

Cases referred to

1 *R v Guilfoyle* [1973] 2 All ER 844 (folld)
2 *Tan Thang Sang v PP; Choong Sze Foong v PP* [1975] 1 MLJ 204 (refd)
3 *R v Newton* (1984) 4 Cr App R 388 (folld)
4 *R v McGrath and Casey* (1983) 5 Cr App R 460 (refd)
5 *R v Nabil Ahmed* (1984) 6 Cr App R 391 (refd)
6 *R v Parker* (1984) 6 Cr App R 444 (folld)
7 *R v Stevens* (1986) 8 Cr App R 297 (folld)
8 *R v Jauncey* (1986) 8 Cr App R 401 (folld)
9 *R v Williams and Ors* (1990) 12 Cr App R 415 (folld)
10 *R v Hall* (1984) 6 Cr App R 321 (folld)
11 *R v Sweeting* (1987) 9 Cr App R 372 (refd)
12 *R v Hawkins* (1985) 7 Cr App R 351 (refd)
13 *R v Bilinski* (1987) 9 Cr App R 360 (refd)
14 *R v Mudd* (1988) 10 Cr App R 22 (refd)

15 *R v Ghandi* (1986) 8 Cr App R 391 (refd)
16 *R v Kerr* (1980) 2 Cr App R 54 (refd)
17 *PP v Hew Yew* [1972] 1 MLJ 164 (refd)
18 *PP v Man bin Ismail* [1939] MLJ 161 (refd)
19 *Jayanathan v PP* [1973] 2 MLJ 68 (refd)
20 *Teo Siew Peng & Ors v PP* [1985] 2 MLJ 125 (refd)
21 *Yau Kong Kui v PP* [1989] 2 MLJ 139 (folld)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) ss 294, 302, 395, 422
Road Traffic Ordinance 1958 s 34A(1)

A Suppiah (*Karpal Singh & Co*) for the appellant.
Ishak bin Yusoff (Deputy Public Prosecutor) for the respondent.

Vincent Ng JC: The appellant pleaded guilty to a charge under s 34A(1) of the Road Traffic Ordinance 1958 ('the Ordinance') and was sentenced by the learned magistrate to six months' imprisonment with the conviction endorsed on the driving licence under s 34A(1A). He was also disqualified from holding or obtaining a driving licence for 12 months under s 34A(1B) of the Ordinance. He now appeals against the sentence.

He had pleaded guilty on 8 May 1991 to the charge in respect of a road accident which occurred on 7 November 1974. Section 34A(1) of the Ordinance reads as follows:

> Any person who by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and use of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public causes the death of any person shall be guilty of an offence and shall on conviction be liable to a term of imprisonment not exceeding five years or to a fine not exceeding five thousand dollars or to both.

The facts of the case adduced briefly by the prosecuting officer only said that the appellant was at the material time driving motor lorry no BN5857 along Glugor Road from Jelutong to Bayan Lepas when he (the appellant) knocked into the back of the deceased's bicycle while trying to overtake the latter, who was travelling in the same direction. As a result, the deceased fell onto the right side of the said lorry and was seriously injured and died soon after admission into the Penang District Hospital. It ought to be noted here that before sentence, no evidence — other than the aforesaid — was adduced in the court below as to the degree of recklessness or culpability and callous disregard for the safety of other road users shown by the appellant. Neither was the sketch plan which was produced by the prosecution (which did not indicate any brake marks on the road), of any help in this regard. Indeed, no record of the conviction was made by the learned magistrate.

Before sentence was passed, the prosecuting officer merely suggested that the court imposed a 'balanced' (by the term 'setimpal') sentence on the grounds that a life had been lost due to the accident. By the term 'balanced'

A the prosecuting officer presumably meant a sentence co-extensive with the offence committed. In this regard, the prosecuting officer was nebulous at worst and ambivalent or equivocal at best.

In his grounds of judgment, though the learned magistrate conceded that the case appeared to be a normal road accident case, he opined that a serious view of the offence should be taken and a fine was not a suitable B penalty in 'reckless driving which had caused loss of a life'. He further held that it was the duty of the court to warn other drivers of vehicles, due to the prevalence of such an offence.

After careful reading of the learned magistrate's judgment, it is pertinent to note that he had paid scant regard for the facts of the particular case C before him and particularly — for sentencing — the circumstances and nature of the accident which would disclose the degree of culpability of the appellant. Indeed, such vital particulars for sentencing were neither elicited by the learned magistrate from either of the parties nor did he glean from the prosecuting officer when the latter presented the facts of the case before sentence was passed. I cannot but feel that the appellant was given exemplary D sentences in terrorem more as a hope that it will be a deterrent to other motorists than because he had driven wilfully in a manner dangerous to the public. This is entirely contrary to the principle of sentencing and also markedly runs counter to the principles enunciated in the English case of *R v Guilfoyle*.[1] As this is a landmark case on the issue of sentencing of a E defendant who had caused death by dangerous driving, I shall take the liberty here to quote in extensionem the material parts of the judgment of Lawton LJ:

> It would appear both from a written statement which the appellant made after the accident and his evidence that he did not appreciate the presence of that mini F car on the road, and the court can understand how that could come about; but it is no answer for the appellant to say, as he did, that he did not see the mini car. It was his duty, before coming out of the minor road on to the major road, to make sure that it was safe for him to do so, and as long as that mini car was there it clearly was not safe.
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> The appellant brought his lorry out of the minor road, across the carriageway G of the major road, intending to turn to his right towards Wakefield. Unfortunately that manoeuvre brought him into the path of the oncoming mini car. There was a collision and all the occupants of the mini car were hurt, and the driver of it died later from his injuries.
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> As I have said, that is a very common type of accident. Clearly, on those facts, the appellant was guilty of causing death by dangerous driving and he has not H sought to appeal against his conviction. What he is saying is that the penalties imposed on him, in all the circumstances, were too severe.

The ratio decidendi of the case being:

> Cases of this kind [ie causing death by dangerous driving] fall into two broad I categories; first, ['first definition'] those in which the accident has arisen through momentary inattention or misjudgment, and secondly ['second definition'] those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness.

And the sentence being:

> In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying.

The above case was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v PP* and *Choong Sze Foong v PP*.[2] The relevant passages are as follows:

> First, *R v Downey* [1954] MLJ 148 was cited where a fine was substituted by five months imprisonment. It was the case of a British soldier, driving off a heavy military truck without permission, partaking of alcohol and then driving at such speed along an open straight road that he lost control and ran into a Malay family who were keeping close to the side of the road. The high degree of culpability on the part of that driver was established beyond question. ...
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> All the above cases were, in my opinion, proper to cite, provided that those appellants had behaved as heinously as Downey and the others. To thus equiparate the appellants with those people not only implied that these appellants deserved more condign punishment, but also a finding of 'dangerous driving' indistinguishable from the conduct of those other drivers. In none of the five cases were the relevant facts set out at all. Being classed together for punishment, in total disregard of the facts of each case, it necessarily follows that these appellants had also been denied due and proper consideration of their defences and the different circumstances under which they became involved in their misfortune.
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> ... In my view such miscarriage of justice must be rectified. I do not think any motorist should be condemned to serve a long stretch in prison unless in the manner of his driving he had shown a culpable and callous disregard for the safety of other road uses. Making scapegoats of innocent motorists is anathema to our administration of justice.
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> I trust therefore that the guidelines laid down by Lawton LJ in *R v Guilfoyle* [1973] 2 All ER 844 which I have recently caused to be circulated to all subordinate courts, will be studied and followed.

In view of the substantial rise in the number of vehicles on the road with concommittant rise in traffic accidents and road accident deaths, I feel obliged in the interest of the public to discuss and endeavour here to resolve the various seemingly intractable issues faced by the lower court in our current case, and generally by the lower courts when dealing with a charge under s 34A(1) of the Ordinance.

The issues are enumerated and dealt with seriatim as follows:

(1) *Basis for sentence in plea of guilty*

As a rule, prosecutors ought to follow as closely as possible to the statute in framing their charges. In the current appeal, the appellant was charged as follows:

> Bahawa kamu pada 7 November 1974 jam lebih kurang pukul 6.45 petang di Jalan Gelugor dalam Daerah Georgetown, di Negeri Pulau Pinang, telah menyebabkan kematian ke atas Mokun a/l Sangili penunggang basikal dengan memandu motolori BN 5857 dengan perbuatan tiada mengendahkan suasana

A dalam semua keadaan (termasuk bentuk, keadaan dan kegunaan jalan, juga kesibukan kenderaan di atas jalan yang boleh dijangkakan) yang merbahaya kepada awam, dan dengan itu kamu telah melakukan kesalahan yang dihukum di bawah s 34A(1) Ordinan Lalu Lintas Jalan 1958.

The contention of the deputy public prosecutor was that, as the appellant B had pleaded guilty to the aforesaid charge in terms aforesaid, it would entail the appellant having admitted that he had driven in 'a reckless manner under all the circumstances which was dangerous to the public' and this could be the basis for a stiff sentence of imprisonment by the learned magistrate.

I cannot accept that this is so. It is the very essence of criminal trial and C procedure and indeed, in the interests of justice, that a line is clearly drawn between pre-conviction and post-conviction stages of a trial, whereby the charge forms the basis of the conviction and facts of the offence including record of previous convictions form the basis for sentence.

Surely, this is strikingly demonstrated by the established procedure D which requires the facts of the offence to be adduced by the prosecution and the accused to admit or deny such facts before sentence is passed. It thus stands to reason that due to the wide statutory discretion given to the courts as regards the severity of the sentence to be meted out to the accused in a criminal charge — such as in a charge under s 34A of the Ordinance — the charge itself could not form the basis for sentence by the sentencer. E Such basis for sentence should necessarily be the facts of the offence put forward by the prosecution as admitted or contested by the accused, for it is precisely through the availability of such facts that the sentencer could have the wherewithal to exercise his discretion as regards the severity of the sentence, within the range permitted by statute, to be imposed on the F accused. It is from the facts of offence as admitted by the court that factors which aggravates the offence are gleaned for the purpose of ordering a punitive (or, under s 34A(1), a custodial) sentence.

Where the accused person pleads guilty to the charge in the indictment but puts forward a version of the facts of the offence which differs significantly from the version advance by the prosecution, the court must resolve as G follows:

(a) If the version of the facts admitted by the accused so markedly or significantly differs from the prosecution's version of facts and which discloses an offence at odds with the very nature or the necessary ingredients of the charge in the indictment that he had pleaded to, the H court has to reject the plea and enter a plea of not guilty to the charge.

(b) However, if the answer to (a) is in the negative and the plea of guilty remains, then the procedure to be followed are as laid out by Lord Lane CJ in the landmark case of *R v Newton*,[3] which obliges the court to conduct a post-conviction hearing to determine the factual basis for sentence, whereby the normal criminal standards of proof apply. I

Newton hearing

Where a 'Newton hearing' takes place, evidence should be called in the normal way by counsel for the accused and the prosecution. It is an

investigation of the facts of a case in order that the sentencer may be properly apprised of the actual basis upon which he should sentence. That investigation should be conducted by counsel appearing for the accused on the one hand and for the prosecution on the other. In coming to a conclusion about the facts, the sentencer should direct himself according to the normal criminal burden of proof (per May LJ in *R v McGrath and Casey*.[4] The view that the proper standard to apply in order to determine the issue is the normal criminal standard, is endorsed in *R v Nabil Ahmed*,[5] where it was said that 'the accused is given the benefit of the doubt (if there is one) ... by the necessity for the court to direct itself that the accused's account must be accepted unless the court is sure that it is untrue?' See also *R v Parker*,[6] where it was assured that in reviewing the findings of fact made by a judge in the course of a 'Newton hearing', the Court of Appeal might apply the same test as the court would apply on a civil appeal, which would be the most favourable test for the (accused) appellant.

Where a defendant puts forward a version of the facts which differs from the case put forward by the prosecution, but his story is disbelieved after a 'Newton hearing', it is now settled that the sentencer may properly withhold some part of the discount which the defendant would normally receive in recognition of his plea of guilty. (see *R v Stevens*;[7] *R v Jauncey*;[8] *R v Williams & Ors*.[9]

The court is not obliged to hear evidence under the principles laid down in Newton[3] aforesaid:

(i) Where the difference in the two versions of the facts is immaterial to the sentence, and the same sentence would be passed however the question was determined. See *R v Hall*,[10] as where the sentence upon the prosecution version is likely to be the same as the sentence imposed if the accused's version is accepted. See *R v Hall*[10] and see also *R v Sweeting*.[11]

(ii) The second exception is where the version put forward by the defence can be described as 'manifestly false' or 'wholly implausible'. See *R v Hawkins*[12] and see eg *R v Bilinski*[13] where the appellant pleaded guilty to being concerned in the importation of 3.036kg of heroin, but claimed that he had been under the impression that the substance was cannabis and also see *R v Mudd*.[14]

(iii) The third exception is where matters put forward by the accused do not amount to a contradiction of the prosecution case but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. Such matters are likely to be outside the knowledge of the prosecution and the prosecution are not bound to challenge the matter put forward by the accused, by cross-examination or otherwise. See *R v Ghandi*;[15] neither is the court bound to accept the truth of such matters put forward by the accused. See *R v Kerr*.[16]

Though I wish to make it starkly clear here that in the interests of the motoring public and other road users the courts should come down hard on certain motorists charged for dangerous driving, and where the facts warrant, impose custodial sentence which they may richly deserve on a conviction

A under s 34A(1) of the Ordinance, yet it is also my view that a motorist should not be so severely sentenced unless the court is satisfied that the accused had shown beyond question, in the manner of his driving, a high degree of culpability amounting to a wilful and callous disregard for the safety of other road users or a selfish disregard for the safety of other road users or of his passengers as accords with the second definition aforesaid of 'dangerous driving' in *R v Guilfoyle*.[1] See also *Tan Thang Sang v PP* and *Choong Sze Foong v PP*[2] at p 208H — first column. In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with characters of an entirely different ken and may thus emerge from prison metamorphized into a personality, the worse for society. Here, I am mindful of Professor TTB Koh's stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18 April 1972, wherein he expressed his concern about the probable 'corrupting influence of the inmate sub-culture', and which is reproduced in [1972] 1 MLJ lvii. This itself is inimical to public interest.

I have committed myself to some research into and discuss in detail the Newton trial above, as, in my opinion the learned magistrate had caused a miscarriage of justice when — notwithstanding a plea of guilty by the appellant in terms of the charge under s 34A(1) of the Ordinance, he imposed a term of, inter alia, six months' imprisonment without any factual basis for imposing such custodial sentence, pursuant to authorities aforesaid, and when he could have called for a Newton trial to establish the basis for such custodial sentence, if needed.

When presenting the facts of the charge for the purpose of sentencing, it is the duty of a competent prosecutor to craft his language in a potent, professional manner and true to facts, for the purpose of driving home, in appropriate cases, the high degree of culpability on the part of the accused, in order to secure the appropriate sentence; the duty of the counsel for the accused to stoutly challenge, where necessary and as instructed by his client, such facts put forward by the prosecution that could have a bearing on the severity of the sentence; and the duty of the court to conduct a Newton trial in such situations.

(2) *The interpretation of 'shall be liable'*

Whether the words 'shall on conviction be liable to a term of imprisonment ... or to a fine ... or to both' in s 34A(1) of the Ordinance do make a term of imprisonment mandatory. I answer this question in the negative as the wording in this section clearly provides for the option of a fine. See *PP v Hew Yew*.[17] By way of an observation, it is worthy to note that the words 'shall be liable ... to imprisonment', with or without the option of a fine does not overrule the exercise of the sentencer's discretionary powers under s 294 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), upon sensible interpretation of the expression 'be liable'. See *PP v Man bin Ismail*[18] and see also the Federal Court (as it then was) decision in *Jayanathan v PP*.[19] Indeed, it is also pertinent to note that, upon the settled principle that vague, inconsistent or contradictory penal provisions when juxtaposed

one to the other, should be construed in favour of the accused, even provisions eg ss 302 and 395 (where whipping is only optional) of the Penal Code (FMS Cap 45) which bears the expression 'shall be sentenced' rather than 'shall *be liable* to be sentenced' do not debar the courts from invoking s 294 of the CPC if the facts warrant its application. See *Teo Siew Peng & Ors v PP.*[20] Whereas s 294 may not, in my opinion be applicable to a charge under s 39A(1) or s 39A(2) due to the provision for imprisonment being coupled with imposition of mandatory whipping.

(3) *The length of term of imprisonment in default of payment of fine*

The question is often raised in the sentencer's mind as to the period of imprisonment to impose in the event that the accused makes default in payment of the fine ordered. In my view, such a period ought to be co-extensive or at least be reasonably co-relative with the income that the accused would have earned in his then current occupation had he not opted to remain in prison. It is thus material for the sentencer to discover and make a record of the accused's income.

Application of s 422 of the CPC

It was also raised that the learned magistrate had failed to formally enter a record of conviction of the appellant.

After reading the record of appeal, I am satisfied that s 422 of the CPC is clearly applicable as a complete answer to this ground of appeal as:

(a) the failure to record was a mere error of omission by the learned magistrate;
(b) there is ample evidence from the records that the appellant had pleaded guilty and was convicted as charged; and
(c) such error of omission had not occasioned a failure of justice. See *Mallal's Criminal Procedure* (4th Ed) pp 590 and 591.

I accordingly allow the appeal, set aside the lower court's sentence and substitute a fine of RM3,000 or in default six months' imprisonment. (The record of appeal at p 8 shows that the appellant was earning RM500 per mensem at the material time of the decision in the court below). I also order that the appellant be disqualified from holding or obtaining driving licence for the period of six months with effect hereof, under s 34A(1B) of the Ordinance. As the accident occurred in 1974 and he was convicted in 1991 (such delay not being caused by him) and if the case in the lower court had taken its normal time frame to complete, any order for indorsement of the appellant's driving licence, if made then, would have spent its period of indorsement by virtue of s 32(5)(a) of the Ordinance, I make no order for such an indorsement. Indeed, it is also, inter alia, for this reason that the disqualification period of my above order is for less than the minimum 12 months' period provided under s 34A(1B). See *Yau Kong Kui v PP.*[21]

Appeal allowed.

Reported by Mathavan Devadas